

In The United States District Court
For The Middle District of Pennsylvania

FILED
HARRISBURG, PA

MAR 05 2024

Keith S. Brown
(Plaintiff)

V S

1:23-CV-01123

PER

DEPUTY CLERK

Officer Col. James Evans et al
(Defendants)

(Jury Trial Demanded)

Plaintiff's Response In Opposition to the Defendant
Eleventh Amendment Immunity and Sovereign Immunity
Motion to Dismiss

- AND now, comes Keith S. Brown ("plaintiff") who respectfully submits the following response in opposition to the preliminary objections filed by the defendants to this action. Counsel for the defendants seek dismissal of the complaint on the bases that it:
- (1) for improper service the plaintiff did file and serve a complaint on the attorney general office himself see exhibit according to Pennsylvania Rule of Civil Procedure 401(2)
 - (2) The plaintiff mailed a copy himself to attorney general office if rather he receive it the plaintiff would not know until now which the case should not be dismissed which improper service can be correct I can forward another copy to the court requesting the sheriff to serve it this time.
 - (3) A legal insufficiency in the form of a demurrer can be correct
 - 4) failed to state a claim under or upon which relief can be granted;
 - 5) failed to state a claim under the Sovereign Immunity act with respect to declaratory judgment and punitive damages. with regard to counsel argument, plaintiff submit any deficiencies in the complaint will be corrected following discovery. as to the as to the other position advanced by the defendants, immunity does not shield the actions of Government employees acting outside the scope of their employment and lastly, The plaintiff will withdraw the request for punitive damages

- (6) The plaintiff Amended his Complaint March 27, 2013
So he has until April 27, 2023 to provide attorney general
with a copy of Amended Complaint So it's not failure to
Effectuate proper Service on Officer Evans
- (7) In this Complaint he alleged On or about April 12, 2022 plaintiff
Was being transport from Lehigh Valley Medical Center By Defendant
Evans who was the driver of the D.O.C Vehicle while texting
on his phone Crash into the Back of a BMW car.
- (8) In this Complaint fact 13[#] while Defendant Evans was driving this
vehicle he was going approximately around 30 or 40 MPH out St.
Clair PA thru way and Decide to texts on his cellular phone
which cause the accident acting reckless disregard to the
plaintiff health and Safety.
- (9) The plaintiff Cause of action in this amended Complaint
Speak for it Self negligence. Cause of Action 1 from 58[#]
to 66[#] of this Complaint

At this point, However, the Complaint Should not be dismissed based
on plaintiff facts and claims. Counsel has states that the Complaint is void
of any reference as to which exception to Sovereign Immunity plaintiff
is proceeding asserting that "(The defendants Should not have to guess"
(prelim. obj.) Based Solely on the facts outlined in the Complaint, any
form of "guess-work" is wholly unnecessary.

The exceptions to Sovereign Immunity
Include: vehicle liability; Medical professional liability; Care, Custody
or Control of personal property; Commonwealth real estate, highways, and
Sidewalks; potholes and other dangerous conditions; Care, Custody, or
Control of animals; liquor store sales; national Guard activities and toxoids
and vaccines 42 PA C.S.A. § 8522(b)(1)-(9). Conversely, In the Comp-
-plaint it was alleged that "(T)he actions of Defendant Evans in driving
at unsafe speeds... and texting constituted the tort of negligence it was
further alleged that "(T)he actions of defendant Evans operating the van while
texting... constituted negligence considering the claims made against
Defendant Evans involved the negligent operation of a vehicle, its perplexing
as to which exception counsel thought plaintiff could have been proceeding.

As previously noted, there is only one exception to Sovereign Immunity under which the factual allegations could proceed. Again the primary basis upon which this is predicated stems from April 12, 2022, negligent operation by a DOC employee, of a DOC owned and operated vehicle. Plaintiff is not claiming have been injured by medical personnel nor by potholes, toxoids and/or vaccines. As nothing in the Complaint can be read to claim otherwise the defendants Summary judgment must be Denied.

(10) Intentional/Willful act:

The defendants next argument is that the Complaint requires dismissal as the General Assembly did not waive Sovereign Immunity for Cause of action Involving Intentional or willful acts (preliminary). As the argument goes the Cause of action against defendant Evans and Dr. Baddick, Boguslaw for "obstruction with the administration of law or other Government function" does not make a case against those defendants insofar as they are shielded by Sovereign Immunity. Id. that view is not shared by the courts of this Commonwealth, just last Term the Supreme Court of Pennsylvania had occasion to define the parameters of the Sovereign Immunity Act. Injustice v. Lombardo, 208 A 3d 1057 (PA 2019), the Court was asked to decide whether Commonwealth employees retain Sovereign Immunity protection even for claims of alleged willful misconduct. The Court began its discussion by noting that:

"...the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy Sovereign Immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity."

Justice, 208 A. 3d at 1066. It was further noted that "[o]ur intermediate appellate courts have held that these protections shield an employee of a Commonwealth agency from the impositions of liability even for intentional torts." Id. Thus the Court concluded, judgment could only be entered if the defendant (Lombardo) was acting outside the scope of his employment... Id. at 1067.

Section 228 of the Restatement provides:

- (1) Conduct of [an employee] is within the scope of employment if:
 But only if:
- (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated at least in part, by a purpose to serve the [employer], and
 - (d) if force is intentionally used by the [employee] against another, the use of force is not unexpected by the [employer].

Restatement (Second) of Agency § 228 (1) (1958). On the other hand, an employee's conduct "is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too actuated by a purpose to serve the master." *Id.*, at § 228 (2). The relevant question in this case is whether defendant Evans, and Dr. Baddick, Boguslaw were acting within the scope of their duties. The facts set forth in the Complaint alleged that defendant Evans, Dr. Baddick, Boguslaw deliberately obstructed Plaintiff's effort to petition the Government for redress of substantial evidence the actions/inaction of those defendants was done in an apparent attempt to prevent Plaintiff from receiving the standard of care for his injuries and to exhausting administrative remedies as required by the Prison Litigation reform act, ("PLRA"), of 1995, which in turn would prevent the plaintiff from receiving compensatory, monetary punitive damages for the injuries he sustained in the federal courts. It is also clear that the actions/inaction of defendant Evans, Baddick, Boguslaw was done in concert to conceal the negligence of them selves and defendant Evans against the question is whether the Department of Corrections employed either, Defendant Evans or Baddick, Boguslaw, to obstruct the administration of justice or to engage in civil conspiracy. It is doubtfully the DOE would purposely hire obstructionists of justice at the taxpayer's expense. Contrary to the arguments of Counsel, the Sovereign Immunity act does not shield commonwealth employees for intentional acts outside the scope of their duty. Moreover, because Sovereign Immunity is on

affirmative defense, the defendant carries the burden at trial of proving that his conduct was within the scope of his employment.

Justice, 208 A.3d at 1068 (citing Reott v. ASIA Trend, Inc 55 A.3d 1088, 1095-96 (Pa 2012)). The Supreme Court has long held that whether a particular act of an employee is within the scope of his employment is ordinarily a question of facts for the jury. Brennan v. Merchant & Co., Inc., 54 A.891 892 (PA 1903). The only exception to this well-established rule is where neither the facts nor the inferences to be drawn from them are in dispute. In such a case, the court may decide the scope of employment as a matter of law. However, where more than one inference may be drawn from the facts, the issue of whether an employee was acting within the scope of employment is for the jury. Iandiorio v. Kriss & Senso Enterprises, Inc 517 A.2d 530, 534 (PA 1986). In other words, it would be inappropriate to decide the issue as the defendants are asking this court to do. It is therefore requested that the preliminary objections be overruled in its entirety.

(4) Punitive Damages:

Upon research of this objection plaintiff is compelled to agree with counsel for the defendants. As such, plaintiff will withdraw the request for punitive damages without prejudice to plaintiff's rights to refile if available in the future.

Conclusion

wherefore, it is respectfully requested that the Summary judgment filed by the Defendants be overruled and the discovery be permitted to proceed, it is further requested that the request for punitive damages be withdrawn by consent without prejudice.

Date: Feb 24, 2024

Respectfully Submitted
Keith S. Brown HS5040
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Hon. Jennifer P. Wilson
United States District Court
Middle District of Pennsylvania
Sylvia H. Rambo United States Courthouse
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